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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-100

In the Matter of

Amendment of Section 73.202(b), RM-8175
Table of Allotments,
FM Broadcast Stations.
(Cleveland and Ebenezer,
Mississippi)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 9, 1995; Released: August 18, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a Petition for Reconsideration filed by Afro-American Broadcasters of Mississippi ("Afro-American Broadcasters").¹ The *Report and Order* substituted Channel 280C3 for Channel 280A at Cleveland, Mississippi, and deleted the vacant Channel 280A at Ebenezer, Mississippi. Radio Cleveland, Inc. ("Radio Cleveland"), licensee of Station WCLD(FM), Cleveland, Mississippi filed an opposition to the petition for reconsideration. No other comments were filed.

2. *Background.* The proceeding began with the filing of a petition for rule making by Radio Cleveland and James L. Haffey d/b/a JimBar Enterprises ("JimBar"), proposing the substitution of Channel 280C3 for Channel 280A at Cleveland, Mississippi, and deletion of vacant Channel 280A at Ebenezer, Mississippi. In response to that petition, the Commission issued a *Notice of Proposed Rule Making*, 8 FCC Rcd 2739 (1993). In response to the *Notice*, Afro-American Broadcasters filed comments requesting retention of Channel 280A at Ebenezer stating its intention to file an application for the channel. Radio Cleveland filed comments stating that Ebenezer no longer qualified as a community for allotment purposes and supported the deletion of Channel 280A at Ebenezer. In addition JimBar, former permittee of Channel 280A at Ebenezer, filed comments arguing that he had determined that Ebenezer, an unincorporated community with a 1984 estimated population of 150, could not feasibly support an FM station in light of current economic conditions. Radio Cleveland, in reply comments, stated that Ebenezer has no local government, school system or local newspaper and is not listed in the U.S. Census. In the *Report and Order*, the Commission concluded that Ebenezer no longer qualified as a "community" for allotment purposes, stating that Afro-American Broadcasters, although provided an opportunity to respond

to JimBar's reasons for deletion of the channel, failed to provide any information as to why the channel at Ebenezer should be retained.

3. *Petition for Reconsideration.* Afro-American Broadcasters state that they timely filed comments expressing their interest in Channel 280A at Ebenezer, and stated their intention to file an application upon the opening of a filing window. Afro-American Broadcasters argue that the *Notice* did not request information "to establish that Ebenezer is community for allotment purposes" nor did the Commission give notice that it was considering deletion of the channel in the face of an expression of interest. They state for this reason, reconsideration and reinstatement of the Ebenezer allotment is fully warranted. Finally, Afro-American Broadcasters contend that Ebenezer is an identifiable population grouping with two churches, a volunteer fire department, one retail store and an Ebenezer water system. They note that the Commission has previously allotted FM Channels to communities having even less indicia than Ebenezer, citing *Yermo and Mountain Pass, California*, 45 RR 2d 58 (1979).

4. Radio Cleveland, in reply states it has demonstrated that Ebenezer no longer qualifies as a "community" for the purposes of Section 307(b). Radio Cleveland further submits that the Commission noted Afro-American Broadcasters' failure to address the discussion in the *Notice* regarding JimBar's reasons for deletion of the Ebenezer allotment, although given the opportunity to do so in comments and reply comments. Radio Cleveland believes that Afro-American Broadcasters had fair notice that the deletion of the Ebenezer allotment was being considered in the proceeding, and that if retention of the Ebenezer allotment was sought, information in support of the continued allotment of the Ebenezer channel should have been submitted. Furthermore, it notes where a substantial community no longer exists, an allotment can and should be deleted, citing *Report and Order* at para.6, *Flora and Kings, Mississippi*, 7 FCC Rcd 5477 (1992), at note 2, and *Garden City, Indiana*, 6 FCC Rcd 3747 (1991). Finally, Radio Cleveland argues that Afro-American Broadcasters have not advanced any persuasive information in support of its request for reconsideration. It notes that their contention that the Commission has not identified any facts regarding subsequent developments justifying the deletion of the Ebenezer allotment is incorrect. Radio Cleveland points out that the *Report and Order* indicated the substantial decline in Ebenezer's population, and its deteriorating economic conditions. Although Afro-American Broadcasters submits that Ebenezer has two churches, a volunteer fire department, a water system and a retail store with Ebenezer in its name, Radio Cleveland states these factors do not provide the basis for a finding that Ebenezer continues to be viable community.

5. *Discussion* We shall deny Afro-American Broadcasters' petition for reconsideration on the underlying merits of the case. While the *Notice* in this proceeding did not specifically request that the proponent of the Ebenezer allotment provide information regarding the community status of Ebenezer, the possible deletion of the Ebenezer allotment was quite clearly a subject of the rule making. The changing economic conditions of Ebenezer were discussed in the *Notice*, and parties had full opportunity to address the issue of retention of the channel and relevant reasons to support

¹ Public Notice of the petition for reconsideration was given on

January 28, 1994, Report No. 1995.

their arguments. Radio Cleveland did just that, contending in its reply comments, that Ebenezer, an unincorporated community with a 1984 estimated population of 150, no longer qualified as a community for allotment purposes. Our deletion of the Ebenezer allotment, and the reasons therefore, were thus a logical outgrowth of the *Notice*.² Nonetheless, as both parties have fully addressed this issue in their pleadings on reconsideration, we will address it more fully here, considering the additional material and arguments presented by Afro-American Broadcasters.

6. The Commission's long standing policy is to allot channels to communities composed of geographically identifiable population groupings. This requirement is generally satisfied if the community is either incorporated or listed in the U.S. Census. Although the 1994 *Rand McNally Commercial Atlas* lists Ebenezer as having a population of 100, the community is neither incorporated nor listed in the U.S. Census. As stated in the *Report and Order*, "mere geographical location is not sufficient to establish community status." See *Vimville, Mississippi*, 48 FR 5974 (1983) and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991). Afro-American Broadcasters' belief that the Commission's prior decision to allot Channel 280A to Ebenezer provides further indicia of community is incorrect. The case at hand is analogous to the case of *East Hemet and Indio, California*,³ in which the channel was deleted after the Commission received information that brought into question the community status of the area. In addition the Commission has stated in *Garden City, Indiana*,⁴ that the inappropriate grant of a channel cannot be used later as qualifying indicia of the existence of a community when a question of error arises after the allotment has been made.

7. Afro-American Broadcasters submit that Ebenezer is an identifiable population grouping with two churches, volunteer fire department, one retail store and a water system. They argue that the Commission has previously allotted FM channels to communities having less indicia than Ebenezer, citing *Yermo and Mountain Pass, California*, 45 RR 2d 58 (Broadcast Bureau 1979). Afro-American Broadcasters state that there are similarities between the community of Mountain Pass and Ebenezer, since the Ebenezer station would serve travelers on an interstate highway. We find Afro-American Broadcasters' comparison of Ebenezer with Mountain Pass as further indicia of community status is unpersuasive. Afro-American Broadcasters provided no information as to the existence of any local government or other indicia of community status such as political, social, or business organizations, aside from a store and a volunteer fire department. Apart from two churches, Ebenezer has no civic organizations, such as a Chamber of Commerce, Lions Club or Rotary Club which identify with the community. Nor have they provided testimony of local residents attesting to Ebenezer's community status.⁵ The allotment to Mountain Pass while lacking some of the indicia of a community as defined by the Commission, was found to be a town with "commonality of purpose" which did provide a first and second FM service to over 28,000 people and a second night-time aural service to almost 7,000 people. Ebenezer, on the other hand, would

not provide service to any unserved or underserved areas. It receives reception service from thirteen radio stations, including one from Yazoo City, Mississippi, located only 10 miles away, which also has a vacant FM channel. After a review of the facts and arguments presented, we conclude that Afro-American Broadcasters has submitted no new information which would warrant the reversal of our earlier decision.

8. In view of the above, IT IS ORDERED, That the petition for reconsideration filed by Afro-American Broadcasters of Mississippi IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

² See *Pinewood, South Carolina*, 5 FCC Rcd 7609, 7610 (1990); *Weyerhaeuser Company v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978); and *Owensboro on the Air v. United States*, 262 F.2d (D.C. Cir. 1958). See also *Hannahs Mill, Georgia*, 7 FCC Rcd 3944, n.6 (1992).

³ *East Hemet and Indio, California*, 3 FCC Rcd 823 (1988).

⁴ See *Memorandum Opinion and Order, Garden City, Indiana*, 6 FCC Rcd 3747 (1991).

⁵ See *Trade, Tennessee and Beech Mountain, North Carolina*, 6 FCC Rcd 5835 (1991).